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IN THE

Supreme Court of the United States

ARTHUR ANDERSEN LLP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NEW YORK COUNCIL OF DEFENSE LAWYERS IN SUPPORT OF PETITIONER

LEWIS J. LIMAN
Counsel of Record
AVRAM E. LUFT
HARLAN G. COHEN
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
212-225-2000

Counsel for Amicus Curiae

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The New York Council of Defense Lawyers ("NYCDL") respectfully submits this brief as *amicus curiae* in support of the Petitioner, Arthur Andersen, LLP.

INTEREST OF THE *AMICUS CURIAE*

The New York Council of Defense Lawyers is a not-for-profit professional association of approximately 200 lawyers (many of whom are former federal prosecutors) whose principal area of practice is criminal defense in the federal courts of New York.[1] The NYCDL's mission is to support and advance the criminal defense function by enhancing the quality of defense representation, taking positions on important defense issues, fostering understanding and consensus in areas of mutual concern to defense lawyers and prosecutors, and promoting collegiality among lawyers on both sides and the bench. As *amicus*, the NYCDL offers the Court the perspective of practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts.

The NYCDL is deeply concerned that the decision of the court below will impair the rights of the accused and all those subject to governmental investigations to a zealous defense by counsel and thereby weaken both the protection of rights and our system of justice. If allowed to stand, the decision could deter attorneys from providing the best legal advice, interfere with the attorney-client relationship, chill zealous advocacy, and erode the protections of the adversarial system.

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[1] Pursuant to Supreme Court Rule 37, *amicus curiae* states that this brief has not been authored in whole or in part by counsel for a party in this case, and no entity other than the *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief are being submitted herewith.

SUMMARY OF THE ARGUMENT

The Fifth Circuit's interpretation of the federal witness tampering statute casts a chilling shadow over legal representation. The Fifth Circuit's expansive definition of "corruptly persuade" under 18 U.S.C. § 1512(b) as including persuasion "having an improper purpose" to impede the fact-finding of an official proceeding would potentially criminalize a broad range of legitimate attorney advice and appropriately zealous advocacy. Lawyers representing corporations or individuals often give advice or take action designed to protect their client yet impede the fact-finding ability of a government investigation. For example, a lawyer may advise a client to construe vague terms in a subpoena calling for documents narrowly or assert a privilege and refuse to produce documents. A lawyer also might attempt to persuade a government official not to further investigate his client. Yet all of these activities would potentially be crimes under the lower court's decision. If affirmed, this construction of Section 1512(b) would disrupt the careful balance of our adversarial system of justice and imperil the attorney-client relationship.

The right to counsel stands at the center of our system of justice. As this Court has recognized, "sound legal advice or advocacy serves public ends." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Justice is best served when a person subject to an investigation or accused of an offense receives zealous representation from an aggressive advocate. To provide that advice, counsel must be unfettered and able to advance the undivided interests of the client without fear of personal consequences for himself or herself. Through zealous representation of their clients, lawyers secure the rights granted by the Constitution. To do

so, attorneys are taken into their clients' confidences based on an understanding that an attorney acts solely in the client's interest. It is the adversarial nature of our legal system, coupled with the intimate trust established in the attorney-client relationship, that ensures the fair adjudication of disputes.

The Fifth Circuit's definition of "corruptly persuades" in Section 1512(b) as "having an improper purpose" undermines these values. The concern that this interpretation of the statute would render illegal much advice and advocacy by lawyers in governmental investigations, to which the client is entitled, is not allayed by Section 1515(c), which protects "lawful, bona fide, legal representation," but is inherently vague. In its totality, under the Fifth Circuit's construction, the statute would chill the client's right to receive objective unbiased advice by placing the lawyer who advocates an aggressive strategy, but not one who advocates a collaborative strategy, in legal jeopardy. The end product will be an attorney-client relationship racked with doubt and an atmosphere in which outside forces dictate that lawyers dampen their representation. Plainly, this interpretation of Section 1512(b) cannot be correct.

Finally, the "official proceeding" element of Section 1512(b) requires intent to obstruct a *particular* proceeding. To find otherwise would be to create an unreasonable standard in which lawyers could face criminal prosecution for general advice given years before the conflict at issue.

ARGUMENT

I. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH SIXTH AMENDMENT VALUES

A. An Attorney's Ability To Zealously Represent Her Clients In The Adversarial Process Is Of Paramount Importance To Our Society

The Sixth Amendment to the U.S. Constitution guarantees a defendant the right "to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. Concomitant with that right is a right to an attorney's full and unfettered advice, unconstrained by any conflict of interest. *See United States v. Cronic*, 466 U.S. 648, 657 (1984). More generally, the Constitution imbues lawyers with an integral role in our system of justice. "[I]t is through counsel that all other rights of the accused are protected: 'Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.'" *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (citation omitted). Attorneys serve as advocates and advisors and play an indispensable role in the protection of individual rights, not only for defendants charged with crimes, but also at earlier stages of a government investigation. *See Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993) (describing the "deprivation of the right to counsel" as a "structural defect"). As Justice Jackson observed:

> [I]t too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice. Law-abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs. The welfare and tone of the legal profession is therefore of prime consequence to society.

Hickman v. Taylor, 329 U.S. 495, 515 (1947) (Jackson, J., concurring).

B. The Fifth Circuit's Definition Of "Corruptly" As "Having An Improper Purpose" Criminalizes Lawful Attorney Activity

The decision below threatens the function of counsel in the adversary system and Sixth Amendment values. The statute used to prosecute Arthur Andersen makes it a crime to "corruptly persuade[] another person, or attempts to do so, . . . with intent to—(1) influence, delay, or prevent the testimony of any person in an official proceeding; (2) cause or induce any person to—(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding; [or] (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding." 18 U.S.C. § 1512(b). In interpreting the language "corruptly persuade," the court below could have joined the D.C. and Third Circuits and held that the statute either requires corrupt means or persuasion to conduct an independently unlawful act. Instead, the court held that it would be satisfied by evidence that one had "an improper purpose," and upheld the district court's instruction that "[a]n improper purpose, for this case, is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding." Pet. App. 21a-22a. Moreover, the court held that merely being cognizant that any type of investigation or

litigation could arise at some future date on some yet unknown topic would be sufficient to meet the "official proceeding" standard.

This vague and expansive interpretation of Section 1512(b), read in isolation, would subject an attorney to jeopardy for a wide variety of lawful and respected attorney actions, and would threaten to impede the client's ability to receive objective and unfettered advice. An attorney's representation of his client frequently has the practical effect of impeding a government investigation. The defense lawyer's role in an official investigation is to zealously represent his client. Our system of law is founded upon that essential notion that adversarial proceedings best promote the interests of justice. *See Herring v. New York*, 422 U.S. 853, 862 (1975). Every person who is a subject or target of an investigation is entitled to that kind of representation and it is through that representation that truth and justice emerge. As this Court has noted, "[t]he paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well-tested principle that truth—as well as fairness—is 'best discovered by powerful statements on both sides of the question.'" *Penson*, 488 U.S. at 84 (citation omitted).

In providing that kind of representation, an attorney may need to give her client advice that, if followed, would result in testimony, a document, or a record being withheld from an official proceeding or that would result in the testimony of a witness being influenced. That is an attorney's job.

For example:

(1) An attorney in a criminal case may advise her client to invoke her Fifth Amendment right to withhold her testimony from the tribunal;

(2) That same attorney may interview witnesses and present them with documents in an attempt to refresh their recollection and make their testimony more accurate;

(3) The attorney may advise her client to assert his Fourth Amendment rights and withhold documents and records from an investigation if police were to attempt to search a home without a search warrant;

(4) An attorney may advise an unrepresented witness to seek assistance of counsel before speaking with government investigators;

(5) The attorney may also advise a client to refuse to provide testimony in an informal interview by government investigators;

(6) That attorney may also advise a client testifying before the grand jury not to volunteer relevant testimony and to only answer the question asked and not speculate if the right question is not asked;

(7) An attorney may advise a client not to produce a class of documents, or a specific document, that have not been described or identified in a subpoena, even though the attorney recognizes that the documents or document contain information that the investigator would want to see;

(8) An attorney may advise a client to amend a statement to regulators, memos, and press releases to remove content that is unnecessary or to make it more accurate;[2]

(9) An attorney advising his client on the content of SEC filings might suggest that the client delete information that is not specifically required or pertinent but that would be useful to the government;

(10) An attorney may attempt to persuade government officials to cease investigating his client.

These are only a few examples of the circumstances in which an attorney zealously representing a client, could engage in activities on behalf of a client for the purpose of "influenc[ing], delay[ing], or prevent[ing] [a person's] testimony," or could provide advice that would "cause or induce any person to—[ ] withhold testimony, or withhold a record, document, or other object" or "alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding." 18 U.S.C. § 1512(b). In each of these instances, the attorney would be advising the client to take an action that the client had every right to take and that would be in the client's interest or would be advising a witness, or government official, on behalf of the client, to do something that is legal. The citizen is entitled to receive unfettered advice to exercise these rights and to have the attorney advocate his position, and our system of justice demands

[2] In fact, the jury focused on just such advice in deciding this case. *See infra* note 4 and accompanying text.

it. Yet, under the Fifth Circuit's decision, the attorney's conduct in each of these examples would be illegal.

Such an interpretation would also radically shift the balance in the adversarial system to the detriment of both the individual and our system of justice. *See Hickman*, 329 U.S. at 514-15 (Jackson, J., concurring). Moreover, so interpreted, the statute would raise serious constitutional concerns, as clients would be denied their most basic right to counsel. Such an unconstitutional interpretation should be avoided. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 190 (1991) (explaining that under the canon of constitutional avoidance, '"the elementary rule is that every reasonable construction must be resorted to, in order to *save* a *statute* from unconstitutionality'") (internal citation omitted); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 500 (1979); *Hooper v. California*, 155 U.S. 648, 657 (1895).

C. Section 1515(c) Does Not Assuage The Threat Posed By The Fifth Circuit's Decision

The Government might argue that Title 18 U.S.C. § 1515(c) prevents the broad interpretation adopted by the Fifth Circuit from sweeping in attorneys' activities. That provision states: "This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding." 18 U.S.C. § 1515(c). It thus excepts from the statute's coverage "the providing of lawful, bona fide, legal representation services." For several reasons, however, that provision does not allay the concerns that the construction

adopted below would criminalize advice and conduct by attorneys acting as zealous advocates.

First, Section 1515(c) itself is plagued with sufficient ambiguity that any attorney who gives advice to withhold evidence or testimony does so, under the Fifth Circuit's interpretation, at her own peril.[3] For example, there is no definition of "lawful" and that term is itself circular. If a lawyer's zealous advocacy of her client may now constitute *unlawful* activity prohibited by Section 1512(b), then Section 1515(c)'s carve-out for *"lawful*, bona fide, legal representation" would provide no comfort at all. *See* Charles W. Wolfram, *Lawyer Crimes: Beyond the Law?*, 36 VAL. U. L. REV. 73, 115 (2001) ("The argument is considerably circular—being based in large part on the requirement that the legal representation be 'lawful.'"). Indeed, the Government, in responding to Arthur Andersen's motion for a new trial, argued that advice from the in-house counsel to change a document constituted fraud and was thus not "lawful" advice under Section 1515(c). *See* Government's Memorandum of Law in Opposition to Andersen's Motion for a Judgment of Acquittal or a New Trial at 22, United States v. Arthur Andersen, LLP (No. 02-0121). *See also United States v. Cueto*, 151 F.3d 620, 631 (7th Cir. 1998), *cert. denied*, 526 U.S. 1016 (1999).[4] Likewise, the term

[3] Very few courts have mentioned or interpreted Section 1515(c), and many open questions remain as to the definition of "lawful, bona fide, legal representation." *See United States v. Kloess*, 251 F.3d 941, 944-49 (11th Cir. 2001); *United States v. Kellington*, 217 F.3d 1084, 1098 (9th Cir. 2000); *Blackmon v. Iverson*, 2002 U.S. Dist. LEXIS 18352, at *12 (E.D Pa., Sept. 26, 2002).

[4] Post-verdict press interviews revealed that the jurors had convicted Arthur Andersen not on the basis of the document shredding alleged in the indictment, but instead on the basis of an e-mail from the company's in-house counsel suggesting that a memo be amended to make it more accurate. *See* Mary Flood, *Decision by Jurors Hinged on Memo*, HOUS. CHRON., June 16, 2002, at 1A. In light of this revelation, Arthur Andersen moved for a new trial, arguing in part, that the in-house counsel's advice was protected under 1515(c). *See* Andersen's Motion for Judgment of Acquittal or a New Trial at 7, United States v. Arthur Andersen, L.L.P. (No. 02-0121).

"bona fide" is not self-defining. It could refer to the relationship between the attorney and the individual withholding testimony or evidence; it could refer to the content of the advice and whether it was "bona fide" in the mind of the reviewing court; or it could have some other meaning. An attorney trying to understand her risks in providing advice could only speculate.

Second, attorneys cannot even be sure what activities will be considered "legal representation services." Attorneys represent their clients' interests in a variety of non-traditional forums. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1043 (1991) ("An attorney's duties do not begin inside the courtroom door.") (Kennedy, J., plurality); *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321, 326-27 (S.D.N.Y. 2003) ("More recently, however, there has been a strong tendency to view the lawyer's role more broadly."). Attorneys are increasingly being hired for both their legal and non-legal skills. For example, an attorney may work with the press or a public relations firm. *See Gentile*, 501 U.S. at 1058 ("[I]n some circumstances press comment is necessary to protect the rights of the client and prevent abuse of the courts."). In doing so, she may make a statement the government alleges was intended to keep witnesses from stepping forward. Arguably, the statement to the press may not be part of the attorney's "legal" role and the safe harbor would not apply. *See, e.g.*,

In re Grand Jury Subpoenas, 265 F. Supp. 2d at 324-32 (considering whether communication with a public relations firm hired by an attorney on behalf of a criminal defendant is protected by attorney-client privilege). Similarly, a corporate general counsel often makes decisions (*e.g.*, implementing a document retention policy) and takes actions (*e.g.*, serving as Secretary at board meetings) that have multiple legal and business purposes. In each of these circumstances, there is a question whether the conduct of the attorney is "legal representation." Attorneys also are routinely involved in advocating their clients' interests before Congress or in lobbying government agencies.[5] Again, it is unclear whether this constitutes "legal representation."

Third, even if some of these terms might be given definition in a particular factual setting, the statute as a whole would still chill zealous advocacy. Under the Government's interpretation, a person who counsels another to take a lawful step with the object of impeding an investigation has committed a crime, save if a safe harbor applies. But the terms of that safe harbor are themselves ambiguous. It is elementary that a lawyer's representation of his client must be unfettered, *see Herring*, 422 U.S. at 857, and that "a defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing 'the undivided interests of his client.'" *Polk County v. Dodson*, 454 U.S. 312, 318-19 (1981). To ensure

[5] In *United States v. North*, 910 F.2d 843, 882 (D.C. Cir. 1990), the D.C. Circuit specifically held that the word "corruptly" in a similar statute, Section 1503, could not be interpreted to criminalize any intent to influence a proceeding, because such an interpretation would criminalize clearly lawful lobbying activities.

that attorneys are acting in their client's interests, counsel must be independent of outside influences, as the attorney is the only person charged with advancing the client's interests in the adversarial process. *See Wheat v. United States*, 486 U.S. 153, 154-57 (1988); *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980); *Mitchell v. Maggio*, 679 F.2d 77, 78 (5th Cir.), *cert. denied*, 459 U.S. 912 (1982); *United States v. DeFalco*, 644 F.2d 132, 136 (3d Cir. 1980). Courts have consistently held that a lawyer who is subject to prosecution by the office investigating his client cannot provide the client effective assistance of counsel. *See Armienti v. United States*, 234 F.3d 820, 825 (2d Cir. 2000); *United States v. Levy*, 25 F.3d 146, 156-57 (2d Cir. 1994); *DeFalco*, 644 F.2d at 136 (finding "inherent emotional and psychological barriers" to zealous advocacy arising out of prosecution of the attorney); *see also Armienti*, 234 F.3d at 825; Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 FORDHAM L. REV. 327, 353 (1998) ("The mere prospect of being investigated may therefore 'chill' a lawyer from undertaking particular conduct.").[6] That concern is all the more heightened, and the deprivation of the right to counsel the greater, where the prosecutor the attorney is "impeding" on

[6] An attorney threatened with prosecution may be "willing to sacrifice or compromise certain trial strategies and defenses." *Levy*, 25 F.3d at 156. A "lawyer[ ] [may] fail[ ] to conduct further investigation, fail[ ] to vigorously cross-examine the government's witnesses, and fail[ ] to make various objections." *Armienti*, 234 F.3d at 825. Such a situation "may induce the lawyer to pull his punches in defending his client lest the prosecutor's office be angered by an acquittal and retaliate against the lawyer." *Thompkins v. Cohen*, 965 F.2d 330, 332 (7th Cir. 1992). "Such retaliation would be unethical; but still the defense lawyer may fear it, at least to the extent of tempering the zeal of his defense of his client somewhat." *Id.* A "lawyer's own criminal investigation [may] cause[ ] him to devote less time to his representation . . . and to be ill-prepared and distracted at trial." *Armienti*, 234 F.3d at 825.

behalf of a client whom the prosecutor is investigating can seek to prosecute the attorney on the basis of the attorney's advice. Under those circumstances, the attorney who gives advice not to cooperate (but not the "cooperative" attorney) would do so at her peril.

Fourth, the safe harbor could be interpreted to be an affirmative defense. *See United States v. Kloess*, 251 F.3d 941, 948 (11th Cir. 2001).[7] If so, an attorney prosecuted for obstruction would bear the burden of pleading the defense as well as the burden of defending himself in court. *See id.* So interpreted, the statutory scheme would result in an ever-present threat of prosecution and a potential tool of harassment. *See, e.g., United States v. Van Engel*, 15 F.3d 623, 629 (7th Cir. 1993), *cert. denied*, 511 U.S. 1142 (1994). Nothing in the safe harbor would stop the prosecutor from hauling the attorney into court.

Fifth, interpreting Section 1512(b) so as to include advice routinely given by lawyers in legal representation would undermine the attorney-client privilege. The Court has repeatedly upheld the importance of the attorney-client privilege. The attorney-client privilege's "purpose is to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Upjohn Co. v. United States*, 449 U.S. at 383, 388 (1981). As this Court explained, "if the purpose of the attorney-client privilege is to be served,

[7] The Eleventh Circuit held that although an attorney bears the burden of pleading the defense, it is the prosecutor that must prove that a lawyer's services were not "lawful, bona fide, and legal." No other circuit has dealt with this issue, and it remains possible that a court could find that an attorney carries the full burden.

the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Id.* at 393. The privilege, however, belongs to the client, not the attorney, and only the client can waive it. *See Haines v. Liggett Group Inc.*, 975 F.2d 81, 90 (3d Cir. 1992); MODEL RULES OF PROF'L CONDUCT R. 1.6 (2003). Yet, in order to protect himself against a criminal prosecution and prove his defense, the attorney would have to pierce the privilege that is so central to legal representation.

Finally, the Fifth Circuit's expansive interpretation of Section 1512(b) also raises the possibility that prosecutors will use privileged communication divulged by defendants against their defense attorneys and so further chill legal advice. It is not an unfamiliar circumstance in the experience of this organization that a client who is insisting on his innocence will, after he hears the evidence, decide to cooperate with the Government and provide testimony against others. In those circumstances, the more investigations and defendants the cooperator creates the better. The incentive is for the cooperator to provide information, however weak, and to create cases. The Fifth Circuit's decision thus creates the risk that the unscrupulous defendant (the one most frequently in need of legal representation) will at some point turn around and attempt to use his attorney's advice against the attorney. In that event, all that would stand between the attorney and criminal investigation is the judgment of a prosecutor. Under these circumstances, an attorney may think twice

before advising someone to withhold evidence or testimony from an investigation.

D. A Narrower Definition Of "Corruptly Persuade" Would Protect The Adversarial System And The Attorney-Client Relationship

The Fifth Circuit could have avoided all of these problems by more narrowly construing "corruptly persuade." The D.C. and Third Circuits have suggested that "corruptly persuade" should criminalize only (1) those acts of persuasion involving "corrupt" means, e.g. bribery, or (2) acts of persuasion aimed at "corrupting" another to violate an independent legal duty, e.g., persuading someone to commit perjury.[8] Consistent with this interpretation, rather than reading Section 1515(c) as a safe harbor from an otherwise expansive statute, the provision should be read as an interpretative guide or "insurance policy," signaling

[8] *See United States v. Davis*, 183 F.3d 231, 249 (3d Cir. 1999) ("[W]e were confident that bribing someone to withhold information or persuading someone to provide false information would be corrupt persuasion."); *United States v. Farrell*, 126 F.3d 484, 488 (3d Cir. 1997) ("[B]oth attempting to bribe someone to withhold information and attempting to persuade someone to provide false information to federal investigators constitute 'corrupt persuasion' punishable under § 1512(b)."); *United States v. Morrison*, 98 F.3d 619, 630 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1131 (1997) (noting "that the *Poindexter* court expressly approved of an interpretation of § 1505 which outlawed conduct 'corrupting' another person by influencing him *to violate his legal duty*") (internal citation and quotation marks omitted); *United States v. Poindexter*, 951 F.2d 369, 385 (D.C. Cir. 1991), *cert. denied*, 506 U.S. 1021 (1992) (holding that a statute requiring that one act "corruptly" could "constitutionally be applied" to "a person who, for the purpose of influencing an inquiry, influences another person (through bribery or otherwise) to violate a legal duty").

Congress' intent that Section 1512(b) should not be construed in a manner that might prohibit "lawful, bona fide, legal representation" or conduct akin to that.[9] *See United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 520 (1992) (Scalia, J., concurring) (explaining that seemingly redundant provisions "are often meant for insurance, to cover anything the draftsman might inadvertently have omitted in the antecedent catalog; and if the draftsman is good enough, he will have omitted nothing at all"). Most attorney conduct would not constitute a violation of Section 1512(b) even if engaged in by a non-attorney. Section 1515(c) would make clear Congress' intent that such conduct not be criminalized. Such a standard would distinguish between traditionally lawful conduct and true obstruction of justice. It would

[9] Section 1515(c) appears under the heading "Definitions for certain provisions; general provision," 18 U.S.C § 1515, and the statute that added 1515(c) listed the new language under the title "Rule of Construction." Victim and Witness Related Amendments, § 50(b), 100 Stat. 3605 (1986). Accordingly, Section 1515(c) must be understood to define the scope of Section 1512(b), rather than the other way around. Further, the legislative history of Section 1515(c) supports reading it as such an insurance policy. The section was enacted in response to complaints that the obstruction statutes were being used by prosecutors to harass defense attorneys. Section 1515(c) was thus enacted to ensure that Section 1512(b) would not be read to include attorney conduct.

> The Subcommittee on Criminal Justice has received complaints of prosecutor's harassing members of the defense bar. Vigorously and zealously representing a client, however, is not a basis for charging an offense under the obstruction of justice chapter. Section 50(2) therefore amends 18 U.S.C. 1515 to provide specifically that the lawful, bona fide provision of legal representation services does not constitute an offense under any of the obstruction of justice offenses in 18 U.S.C. ch. 73.

132 Cong. Rec. H11291 (Oct. 17, 1986).

protect the traditional role of the attorney and allow attorneys to advise clients of their rights.[10]

Moreover, unlike the Fifth Circuit standard, a standard such as that adopted by the D.C. and Third Circuits provides certainty.[11] Attorneys know that their traditional

[10] This interpretation also has the benefit of eliminating the "surplusage" problem identified by the Third Circuit. The Third Circuit observed that "corruptly persuade," as used in Section 1512(b), "cannot mean simply 'persuades with the intent to hinder communication to law enforcement' because such an interpretation would render the word 'corruptly' meaningless." *Farrell*, 126 F.3d at 487. "[B]ecause the 'improper purposes' that justify the application of § 1512(b) are already expressly described in the statute, construing 'corruptly' to mean merely 'for an improper purpose' (including those described in the statute) renders the term surplusage, a result that we have been admonished to avoid." *Id.* at 490 (citing *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994)).

[11] The D.C. Circuit raised serious concerns that defining "corruptly persuade" as "having an improper purpose" would render the statute unconstitutionally vague. *See Poindexter*, 951 F.2d at 378; *Morrison*, 98 F.3d at 630 (applying *Poindexter* to Section 1512(b)); *see also Davis*, 183 F.3d at 249 ("approv[ing] of *Poindexter*'s reasoning in the § 1512 context"); Pet. App. 19a (admitting that "defining 'corruptly' in terms of improper purpose" casts a "dim light . . . upon its meaning"). The court observed that the word "corruptly" is vague, and that "improper," the word endorsed by the Fifth Circuit, "may be less specific—than 'corrupt.'" *Poindexter*, 951 F.2d at 378-79. Defined that way, Section 1512(b) would be too indeterminate and provide too little notice to pass constitutional muster. *See id.* The Third Circuit also observed that "corruptly" was vague. *See Farrell*, 126 F.3d at 487. That circuit rejected the "having an improper purpose" interpretation, holding that "corruptly persuade," as used in Section 1512(b), "cannot mean simply 'persuades with the intent to hinder communication to law enforcement' because such an interpretation would render the word 'corruptly' meaningless." *Id.*; *see also Davis*, 183 F.3d at 248 ("Simply interfering with the flow of information to the government is not enough to constitute witness tampering."); *supra* note 8.

advice remains lawful and know that the law encourages them to protect their client's interests to the full extent allowed by the law. Confident that their advice and conduct are lawful, attorneys can act as zealous advocates for their clients.

II. THE FIFTH CIRCUIT'S APPROVAL OF AN OVERBROAD DEFINITION OF "OFFICIAL PROCEEDING" ALSO THREATENS TO CRIMINALIZE AND CHILL TRADITIONAL ATTORNEY CONDUCT

The very real threat to attorneys outlined above is further exacerbated by the Fifth Circuit's definition of Section 1512(b)'s "official proceeding" requirement. Section 1512(b) prohibits witness and evidence tampering intended to impact "an official proceeding." The question before the Fifth Circuit was whether a defendant must have some expectation of a *particular* proceeding before he can be guilty of obstruction of justice. Despite finding that the argument for "some limiting sights" on the statute was "not without force," Pet. App. 27a, the Fifth Circuit refused to limit the statute's scope. Instead, it held that there need not be proof that the defendant contemplated that his action would affect a particular official proceeding. Because Section 1512, unlike related obstruction statutes, does not require that the proceeding be pending at the time of the offense, 18 U.S.C. § 1512(f)(1), there is a grave danger that, unless some nexus is required, the statute would be impermissibly broad[12] and would threaten to criminalize traditionally lawful attorney conduct.

[12] In *United States v. Aguilar*, 515 U.S. 593, 599 (1995), this Court held that 18 U.S.C. § 1503, a related obstruction statute, included "a

Under the Fifth Circuit's rubric, even the most general of legal advice would now risk running afoul of Section 1512(b). Without any requirement that a defendant have a particular proceeding in mind, an attorney who provides general legal advice intended to limit her clients' exposure would have exposed a broad range of ordinary attorney conduct, untethered by any temporal constraints, to being construed as criminal obstruction of justice.

A prime example of the uncertainty spread by the Fifth Circuit's decision is the status of document retention policies. Notwithstanding the Fifth Circuit's suggestions to the contrary, *see* Pet. App. 25a, that court's decision renders all document retention policies vulnerable. As attorneys are always aware of the possibility of theoretical government investigations, the advice to adopt a document retention policy could itself be construed as obstruction of justice. Under the Fifth Circuit's theory, a policy adopted years, even decades, before the events leading to an investigation could be the basis for a conviction. In the face of such a possibility, lawyers may cease to advise legal document retention policies, even when they may otherwise be in their clients' best interest.

Congress could not have intended such an uncertain rule. Any reasonable reading of Section 1512(b) must include a requirement that the defendant acts in expectation that a particular proceeding is probable. Anything less risks criminalizing respected attorney conduct.

'nexus' requirement—that the act [ ] have some relationship in time, causation, or logic with the judicial proceedings." The First Circuit and Fifth Circuits, *see United States v. Frankhauser*, 80 F.3d 641, 651 (1st Cir. 1996); *United States v. Shively*, 927 F.2d 804, 812-13 (5th Cir.), *cert. denied*, 501 U.S. 1209 (1991), extended this logic to Section 1512(b).

CONCLUSION

Accordingly, the judgment of the court of appeals should be reversed.

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Respectfully submitted,

NEW YORK COUNCIL OF DEFENSE LAWYERS

LEWIS J. LIMAN
Counsel of Record
AVRAM E. LUFT
HARLAN G. COHEN
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2000

Counsel for Amicus Curiae